# Khoo Kay Hoe (trustee to the estate of Oh Kee Lee @ Oh Phaik Sim, deceased) v Chor Phaik Har and another appeal

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEALS NO 02-5 OF 2000 (P) AND NO 02-6 OF 2000 (P)
EUSOFF CHIN CHIEF JUSTICE, WAN ADNAN CJ (MALAYA) AND MOHAMED DZAIDDIN FCJ
7 NOVEMBER 2001

***Bankruptcy*** *— Act of bankruptcy — Failure to pay costs — Whether appellants had committed an act of bankruptcy — Bankruptcy notice founded on an allocatur — Whether allocatur was a final judgment — Bankruptcy Act 1967 s 3(1)(i)*

Pursuant to a court order ('the order') made on 7 September 1991 in respect of Penang High Court Civil Suit No 315 of 1983 ('the civil suit'), the appellants were ordered to discontinue the civil suit against the respondent on the terms that the appellants be debarred from bringing a fresh action against the respondent and that the appellants pay the respondent costs. The costs were taxed for RM160,699.97 and an allocatur was issued on 9 February 1994 to that effect. As no payment based on the allocatur was made, the respondent commenced bankruptcy proceedings against the appellants and the appellants were subsequently adjudged bankrupt. The appellants applied to set aside the bankruptcy proceedings on the ground of nullity and filed a notice of appeal against the decision of the registrar. In the appeal before the High Court judge, the appellants argued that they had not committed an 'act of bankruptcy' within the meaning of s 3(1)(i) of the Bankruptcy Act 1967 ('the Act') because the bankruptcy notice was not founded on a final judgment or order but on an allocatur. The High Court judge held that the order was a final order and that the respondent was entitled to commence bankruptcy proceedings against the appellants based on the allocatur. The appellants appealed to the Court of Appeal but their appeal was dismissed with costs. This was the appellants' appeal against the decision of the Court of Appeal.

**Held**, dismissing the appeal:

(1) The central issue in this appeal was whether an allocatur was a final judgment. Following *Re Wheeler* [1982] 1 All ER 345, an allocatur was a final order within the meaning of s 3(1)(i) of the Act. It followed that a bankruptcy notice, which was founded on an allocatur, was a valid notice (see pp 278B, 282A); *Cartwright v Barker* [1975] 2 All ER 970 distinguished.

(2) The bankruptcy notice was not based on the allocatur only. The request for the issue of the bankruptcy notice and the bankruptcy notice referred to the allocatur and the allocatur in turn referred to the order. The order required costs to be taxed and the

allocatur was the result of such taxation. Accordingly, the allocatur was in accordance with the terms of the order (see p 282B–C).

**[Bahasa Malaysia summary**

Menurut satu perintah mahkamah ('perintah tersebut') yang dibuat pada 7 September 1991 berhubung dengan Guaman Sivil Mahkamah Tinggi No 315 tahun 1983 ('guaman sivil tersebut'), perayu-perayu telah diperintahkan untuk tidak meneruskan guaman sivil terhadap responden berdasarkan terma bahawa perayu-perayu telah disekat daripada memulakan satu tindakan baru terhadap responden dan bahawa perayu-perayu membayar kos kepada responden. Kos ditaksir sebanyak RM160,699.97 dan satu alokatur telah dikeluarkan pada 9 Februari 1994 bagi tujuan tersebut. Memandangkan tiada bayaran dibuat berdasarkan alokatur yang telah dibuat, responden telah memulakan prosiding kebankrapan terhadap perayu-perayu dan perayu-perayu berikutan itu dihukum bankrap. Perayu-perayu memohon untuk mengetepikan prosiding kebankrapan tersebut atas alasan pembatalan dan memfailkan satu notis rayuan terhadap keputusan pendaftar. Dalam rayuan di hadapan hakim Mahkamah Tinggi, perayu-perayu menghujahkan bahawa mereka tidak melakukan satu 'tindakan kebankrapan' dalam maksud s 3(1)(i) Akta Kebankrapan 1967 ('Akta tersebut') kerana notis kebankrapan tidak berdasarkan penghakiman atau perintah muktamad tetapi sebaliknya di atas satu alokatur. Hakim Mahkamah Tinggi memutuskan bahawa perintah tersebut adalah satu perintah muktamad dan bahawa responden berhak memulakan prosiding kebankrapan terhadap perayu-perayu berdasarkan alokatur. Perayu-perayu membuat rayuan kepada Mahkamah Rayuan tetapi rayuan mereka telah ditolak dengan kos. Ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Rayuan.

**Diputuskan**, menolak rayuan tersebut:

(1) Persoalan utama dalam rayuan ini adalah sama ada alokatur tersebut adalah satu penghakiman muktamad. Menurut *Re Wheeler* [1982] 1 All ER 345, alokatur tersebut adalah satu perintah muktamad dalam maksud s 3(1)(i) Akta tersebut. Maka, satu notis kebankrapan yang didapati atas alokatur adalah satu notis yang sah (lihat ms 278B, 282A); *Cartwright v Barker* [1975] 2 All ER 970 dibeza.

(2) Notis kebankrapan tersebut tidak berdasarkan alokatur sahaja. Permintaan untuk pengeluaran notis kebankrapan dan notis kebankrapan telah dirujuk kepada alokatur dan alokatur tersebut telah merujuk kepada perintah tersebut. Perintah tersebut menghendaki kos ditaksir dan alokatur tersebut adalah hasil taksiran tersebut. Sewajarnya, alokatur tersebut adalah menurut terma-terma perintah tersebut (lihat ms 282B–C).]

**Notes**

For cases on act of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1556–1579.

**Cases referred to**

*Alexander, Re* (1892) 1 QB 216 (refd)
*Cartwright v Barker* [1975] 2 All ER 970 (distd)
*Crump, Re* (1891) 64 LT 799 (refd)
*Haroun Al-Rashid bin Mohd Yusof, Re; ex p Daya Leasing Sdn Bhd* [1996] 5 MLJ 317 (refd)
*Karnoid Debtors, Re* The Times 21 May 1988 (refd)
*Wheeler, Re* [1982] 1 All ER 345 (folld)
*Wilmot v Buckley* [1984] 2 FCR 540 (refd)

**Legislation referred to**

Bankruptcy Act 1914 [Eng] ss 2, 147(1)
Bankruptcy Act 1966 [New South Wales] s 40(1)(g)
Bankruptcy Act 1967 ss 3(1)(i), 131
Bankruptcy Rules 1969 r 92(a)

**Appeal from:** Civil Appeals No P–03–7 of 1996 and No P–03–8 of 1996 (Court of Appeal, Kuala Lumpur)

*K Kirubakaran* (*R Ramanathan* with him) (*Ram Pillai & Associates*) for the appellant.

*N Chandran* (*Toh Lee Hong* with him) (*Kek Ooi & Lee Hong*) for the respondent.

**Mohamed Dzaiddin FCJ** (delivering judgment of the court): Both these appeals were heard together on 18 September 2000 and subject of one judgment. The questions reserved for our consideration are as follows:

(1) whether a bankruptcy notice founded on an allocatur is valid;

(2) assuming the bankruptcy notice is defective or irregular whether it is curable under s 131 of the Bankruptcy Act 1967 ('the Act') on the particular circumstances of this case.

*Background facts*

The appellants were trustees of the Estate of Oh Kee Lee @ Oh Phaik Sim, deceased. On 7 September 1991, they were ordered to pay the respondent costs in respect of Penang High Court Civil Suit No 315 of 1983 which was later taxed for RM160,699.97 and an allocatur was issued on 9 February 1994 to that effect. As no payment based on the allocatur was made, the respondent commenced bankruptcy actions against the appellants. On 10 May 1994, the solicitors filed a request for bankruptcy notice pursuant to r 92 of the Bankruptcy Rules 1969 ('the Rules') and exhibited a copy of the allocatur upon which the notice was founded. It is significant to note

here that no office copy of the judgment or order was produced in accordance with r 92(a).

On 18 May and 8 June 1994 respectively, bankruptcy notices were accordingly issued against the appellants which was followed by the presentation of the creditor's petitions on 23 November 1994 founded on the bankruptcy notices which were served on the appellants by substituted service. On 26 April 1995, the appellants were adjudged bankrupt.

On 29 April 1995, the appellants applied to set aside the bankruptcy proceedings on ground of nullity and filed a notice of appeal against the decision of the registrar.

*Decision of the High Court*

In the appeal before the learned High Court judge, it was the appellants' contention that they had not committed an 'act of bankruptcy' within the meaning of s 3(1)(i) of the Act because the bankruptcy notice was not founded on a final judgment or order but on an allocatur. The learned judge dealt with counsel's arguments in the following manner (at p 21 rekod rayuan 2):

> On the second issue raised by the judgment debtor, Mr Tan argued that the bankruptcy notice dated 8 June 1994 was based on the allocatur dated 9 February 1994, whereas, in his contention, an allocatur is not a final judgment or an order for costs. In support, he cited the case of *Re Alexander; ex p Alexander* [1892] 1 QB 216 (CA).
>
> Counsel for judgment creditor argued that the order dated 7 September 1991 is a final order as it granted leave to the judgment debtor to discontinue his actions vide Civil Suit No 315 of 1983 against the judgment creditor on terms inter alia that: (a) judgment debtor do pay costs to the judgment creditor and for assessment or damages; and (b) the judgment debtor is debarred from bringing a fresh action — to give effect to the doctrine of res judicata. He referred to para 6 of the order of court dated 7 June 1991 in Civil Suit No 315 of 1983 which states as follows:
>
> (6) the plaintiffs be and are hereby at liberty to discontinue this suit pursuant to O 21 r 3 of the Rules of the High Court 1980 on terms that:
>
> (a) the plaintiffs be and are hereby deprived of their right to bring a fresh action in order to give effect to the doctrine of res judicata;
>
> (b) the plaintiffs pay to the third defendant the costs of this action (including this application ) to be taxed;
>
> (c) there be an inquiry before the senior assistant registrar to determine what damages (if any) was suffered by the third defendant by reason of the interim injunction which the plaintiffs, according to their undertaking, ought to pay; ... .

In dismissing the appeal his Lordship ruled as follows (pp 22–23):

> In my judgment, the order of 7 September 1991, is clearly — considering the peculiar words expressed therein — a final order granting leave to the judgment debtor to discontinue his actions, a fortiori as the order expressly

A debars the judgment debtor from bringing a fresh action. No other interpretation can be given to it, as it was further declared therein that any fresh action would run foul of the doctrine of res judicata. In my considered view, as the final order required costs to be taxed by the registrar, the allocatur which bears the result of such taxation should rightly constitute part of and be read in conjunction with the final order of 7 June 1991, which is crystal clear in its content. The judgment creditor is therefore entitled to commence bankruptcy proceedings against the judgment debtor based on the allocatur, which in any event, was submitted therein together with the final order of court dated 7 June 1991.

*Proceedings in the Court of Appeal*

C The judgment debtors by leave of the court dated 15 January 1996 appealed to the Court of Appeal against the whole of the decision of the learned High Court judge. The main ground of appeal was that the learned judge erred in holding that the respondent was entitled to commence bankruptcy proceedings against the judgment debtors based on the allocatur. Reliance D was placed on the English Divisional Court of Appeal decision in *Cartwright v Barker* [1975] 2 All ER 970 which held that in the case of costs, the effective judgment was the decree of the court itself ordering costs to be paid, and not the certificate quantifying costs. Counsel also relied on the High Court decision in *Re Haroun Al-Rashid bin Mohd Yusof; ex p Daya Leasing Sdn Bhd* [1996] 5 MLJ 317 which followed *Cartwright*.

E The Court of Appeal dismissed both appeals with costs. Abdul Malek Ahmad JCA (as he then was), delivering the judgment of the court, held as follows (p 45 rekod rayuan 1):

> 20 [W]e were inclined to agree with learned counsel for the respondent and the learned High Court judge. We are faced with a situation here where F the so called final judgment or order relates to the costs which form the basis of the consequent bankruptcy proceedings. But those costs are not quantified in that final order. This is followed by the allocatur where the quantification takes effect. In essence, the allocatur merges with the order for costs.
>
> G 21 What follows are the bankruptcy proceedings to recover the judgment debt for costs. The appellants chose not to do anything at all to set aside those proceedings. Were they misled? We find that suggestion quite impossible since the number of the relevant suit is stated in all the relevant papers.
>
> 22 Would not they be liable to pay the costs stated in the allocatur? We hold H that they would be and this attempt to say that bankruptcy proceedings cannot be based on an allocatur when no steps had been taken to set them aside merely denotes that if we were to agree with this technicality, the respondent would not have any recourse at all to recover the costs against the appellants despite the final judgment or order. This would render the final judgment or order meaningless.
>
> I 23 We are further fortified in our reasoning by the words 'or sum ordered to be paid' appearing twice in para (i) of sub-para (1) of s 3 of the Act after the words 'judgment debt'. The first time they appear, they are qualified

by the words 'in accordance with the terms of the judgment or order'. *The allocatur, in our view, is in accordance with the terms of the judgment or order in the relevant suit.* (Emphasis added.)

24 Accordingly, we dismissed both appeals with costs. The deposits are to go to the respondent to account of their taxed costs.

*Appeal to this court*

The central issue in this appeal is whether an allocatur is a final judgment or final order within the meaning of s 3(1)(i) of the Act.

The material part of s 3(1)(i) of the Act states:

(1) A debtor commits an Act of bankruptcy in each of the following cases:

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him. ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order ...

The basis of the appellants' submissions on s 3(1)(i) of the Act revolved on the construction of the words 'final judgment or final order.' Dato' Sethu, for the appellants, submitted that the judgment must be a final judgment or order for the payment of any amount. The request for issue of bankruptcy notice must also be in a statutory form which uses the expression 'final judgment'. In the instant case, no judgment was referred to in the request. He submitted that every bankruptcy notice must identify the source of liability. Here, no such judgment for the payment of any amount had been referred to in the request or the notice.

Secondly, counsel submitted that the bankruptcy notice dated 18 May 1994 referred to the allocatur and not the judgment. He argued that an allocatur is not a final judgment and relied on *Cartwright*, where it was held that a certificate of taxation is not a final judgment. See also *Wilmot v Buckly* [1984] 2 FCR 540 which followed *Cartwright*. We shall no doubt deal with these authorities shortly.

On the second question, counsel submitted that in the circumstances of the case, the failure to identify the source of liability in the request and the notice is not a formal defect but one of jurisdiction which is not curable under s 131 of the Act.

Mr N Chandran, for the respondent, submitted that the order for costs was the result of the discontinuance of Civil Suit No 315 of 1983 by the appellant on 7 September 1991 and the order was for costs payable to be taxed. Accordingly, a bill of costs was prepared by the respondent which was taxed by the registrar on 12 March 1992 and an allocatur was issued dated 9 February 1994. Counsel pointed out that the request for issue of the bankruptcy notice dated 10 May 1994 made specific reference to the allocatur based on Civil Suit No 315 of 1983. Similarly, the bankruptcy notice dated 18 May 1994 also mentioned about the sum of RM160,699.97 being the amount of the allocatur for the same civil suit. Therefore, both notices referred to the allocatur in the civil suit in which the order was made.

A Hence, he submitted it was factually incorrect to say that the bankruptcy notice was founded on the allocatur.

On the second question, counsel argued that if at all there was a defect, it was only formal which was curable under s 131 of the Act.

Turning to the first question, we shall now examine *Cartwright*.

B The facts in *Cartwright* are these. On 5 November 1970, the petitioning creditor obtained in the Chancery Division an injunction against the debtors. The court ordered the debtors to pay the petitioning creditor's costs which were to be taxed by the taxing master. On 20 March 1974, the taxing master issued a certificate certifying that he had taxed the costs, that the petitioning creditor's costs were taxed at £572.17, and that the expenses C of the petitioning creditor and of the debtors were respectively £36.94 and £38. The petitioning creditor was therefore owed a balance of £572.11. In May 1974, a bankruptcy notice in the prescribed form was issued against the debtors which specified the debt as:

> D .... the sum of £571.11 claimed by [the petitioning creditor] as being the amount due on a final judgment or order obtained by him against [the debtors] in the High Court of Justice dated 20 March 1974 ...
>
> The debtors applied to the county court to set aside the bankruptcy notice but their application was dismissed.

E On appeal to Divisional Court of the Chancery Division, two questions arose viz: (i) whether the bankruptcy notice was in accordance with s 2 of the Bankruptcy Act 1914 ('the English Act') in requiring the sum to be paid in accordance with the terms of the judgment or order on which it was founded; and (ii) if not, whether the shortcomings of the bankruptcy notice were a formal defect or irregularity which the court could cure by using its F discretion under s 147(1) of the English Act.

The Divisional Court of Appeal allowed the appeal and set aside the bankruptcy notice and held (per Goulding J) as follows (at p 972):

> G In my judgment it is clear that the certificate of 20 March 1974 is not a final judgment or order. It is not in any sense an order for the payment of a sum of money. The order is that of the court dated 5 November 1970. In order to issue execution on it, it would be necessary to produce both the order of November 1970 and the taxing master's certificate, or possibly to have the amount of costs found due by the certificate endorsed on the order of 5 November 1970 itself by procedure similar to that considered in *Re Crump*. Thus, the bankruptcy notice is not in my view in accordance with the prescribed form because it does not show under what judgment or order the H sum is due, and it is not in accordance with s 2 of 1914 Act because it does not require the sum to be paid in accordance with the terms of the judgment or order.

The headnote, sets out the ratio decidendi of the judgment which reads:

> I *In the case of costs the effective judgment was the decree of the court itself ordering costs to be paid, and not the certificate quantifying costs.* Accordingly, the relevant judgment or order for the purposes of the bankruptcy notice was the order of 5 November 1970 and not the taxing master's certificate. (Emphasis added.)

Walton J entirely agreed with Goulding J's judgment. His Lordship said that the whole point of *Re Crump* (1891) 64 LT 799 (referred to in *Cartwright*) was that an allocatur is not a judgment or order for the payment of money. He added however in order to find that one has got to go back to the original judgment.

In *Wilmot v Buckley*, the Supreme Court of New South Wales decided that a certificate of taxation is not, without the entry of a judgment in the action, a final judgment or order within the meaning of s 40(1)(g) of the Bankruptcy Act 1966. Following *Cartwright* the court said that in the case of costs, the only effective judgment or order is the order of the court itself not the certificate quantifying their amount.

Counsel for the respondent however contended that the facts in *Cartwright* were clearly distinguishable from the facts in the instant case. According to him, the bankruptcy notice in *Cartwright* only made reference to the registrar's certificate and did not show under what judgment or order the sum was due. Whereas in the instant case, the allocatur referred to in the bankruptcy notice made specific reference to the civil suit from which the order for costs was made. At any rate, Mr Chandran submitted that *Cartwright* had been superseded by *Re Wheeler* [1982] 1 All ER 345 and *Re Karnoid Debtors* The Times, 21 May 1988.

In *Re Wheeler*, the facts insofar as relevant to the issue under discussion are as follows. On 17 December 1979, the plaintiffs obtained judgment against the defendants and an inquiry was ordered as to the damages payable and whether the defendants had obtained a profit from a particular transaction. The judge also ordered the defendants to pay the plaintiffs costs of the action to be taxed, and although making no order on the procedure summons themselves, he ordered the defendants to pay the costs of each summons to be taxed. The plaintiffs' solicitors prepared a composite bill of costs covering the costs of the action and the procedure summonses and submitted it for taxation. On 24 October 1980, the taxing master taxed part of the composite bill and issued an interim certificate for the amount of the costs he had taxed in the sum of £20,000. Thereupon, the defendants became jointly and severally liable to pay that sum. Since, however, neither defendant paid the £20,000 due under the interim certificate, on 6 November 1980 the plaintiffs served a bankruptcy notice on the other defendant, W, requiring him to pay, within ten days of service of the notice on him, the sum of £20,000 as being the amount due in respect of part of the costs ordered to be paid by him 'on four final orders ... as evidenced by the interim certificate ... dated 24 October 1980'. W failed to comply with the bankruptcy notice and the plaintiffs presented a bankruptcy petition founded on the notice. In due course, on 11 March 1981, a receiving order on the petition was made against W. He appealed against the making of the order to the Divisional Court which allowed the appeal. The plaintiffs as judgment creditors appealed to the Court of Appeal.

We pause here to note that the Court of Appeal did not at all consider *Cartwright*, although it was cited in the report. Lawton LJ dealt with the following point raised by W. He stated that W went on to submit that in all

A the circumstances of this case, the interim certificate, in any circumstances, could not constitute a final order, because in the litigation which had been started by the judgment creditors there still had to be an inquiry as to damages and also an inquiry as to the profit (if any) which he and Mr Argent had obtained as a result of the activities of a named company. He argued that the essence of a final order is that there is finality and that the debtor B knows exactly what he has got to pay at the end of all the litigation. W said he did not know what he had to pay, because the inquiries had never been completed. It followed, he said, that there was not a final judgment.

In answering the above point, his Lordship said (at p 352) that the argument which was put forward by W was dealt with many years before his C case in *Re Alexander* [1892] 1 QB 216, a case relating to a dispute about a partnership, where the Court of Appeal held that 'the order as to costs was a 'final judgment' in the plaintiff's favour for the amount of taxed costs, and that the plaintiff was entitled to issue a bankruptcy notice against the defendant for that amount'.

D Allowing the appeal, the court held (at p 346):

(1) The bankruptcy notice of 6 November 1980 complied with ss 1(1)(g) and 2 of the 1914 Act because although on its face the notice referred to four orders, namely the order for costs in the action and the orders for costs in the three procedure summonses, those four orders had been channeled into the interim certificate issued on 24 October 1980 for £20,000 and E had thereby become one order relating to one debt (for £20,000) made in one action, and accordingly the bankruptcy notice did not refer to more than one order. *Furthermore, the interim certificate issued on 24 October 1980 constituted 'a final order' for the purposes of ss 1(1)(9) and 2 even though the inquiries ordered by the judge into damages and the profit if any obtained from a particular transaction had not been completed.* (Emphasis added.)

F

*Conclusions*

In our view, the answer to Question 1 lies on whether an allocatur is a final judgment or a final order within the meaning of s 3(1)(i) of the Act. An allocatur is the certificate of the taxing master as to the amount of costs G allowed.

In *Cartwright*, the bankruptcy notice required the debtors to pay the sum of £571.11 based on the taxing master's certificate of 20 March 1974 when the actual order for the payment of the sum was the order of court dated 5 November 1970. The Divisional Court held that the taxing master's H certificate of 20 March 1974 was not a final judgment or order, in a sense an order for the payment of a sum of money. Hence, the bankruptcy notice was not in accordance with s 2 of the English Act.

In *Re Wheeler*, the bankruptcy notice sought the debtor to pay the sum of £20,000 as being the amount due as part of the costs 'ordered to be paid on four final orders' as evidenced by the interim certificate dated I 24 October 1980. The Court of Appeal held that the interim certificate constituted a 'final order' and that accordingly the bankruptcy notice complied with the requirements of the English Act in referring to the

final order as the origin of the debt on which the bankruptcy notice was based. A

Following *Re Wheeler*, we hold that an allocatur is a final order within the meaning of s 3(1)(i) of the Act. It follows that a bankruptcy notice which is founded on an allocatur is a valid notice.

The next question which we must consider is whether on the particular facts and circumstances of this case, the bankruptcy notice is based only on the allocatur dated 9 February 1994. The complaint of the appellants was that both the request and the bankruptcy notice referred only to the allocatur dated 9 February 1994 for the payment of the sum of RM160,699.87 in Civil Suit No 315 of 1983. The allocatur however referred to the order of court of 7 September 1991 which was not produced. Having considered the matter, we agree with the courts below that the order of court of 7 September 1991 (para 6) required costs to be taxed and the allocatur of 9 September 1994 was the result of such taxation. It follows that the allocatur is in accordance with the terms of the final order of the court dated 7 September 1991 in Civil Suit No 315 of 1983. B C D

For the above reasons, we would answer this question in favour of the respondent.

In view of the above finding, we do not propose to answer Question 2.

Accordingly, both the appeals are dismissed with costs. The deposits will be paid to the respondent on account of taxed costs. E

*Appeal dismissed.*

Reported by Lim Lee Na

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